

APR 14 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DEANTE BROUSSARD,

Defendant - Appellant.

No. 08-10128

D.C. No. CR-06-0544-01 MHP

MEMORANDUM^{*}

Appeal from the United States District Court
for the Northern District of California
Marilyn H. Patel, District Judge, Presiding

Argued and Submitted February 13, 2009
San Francisco, California

Before: GOODWIN, SCHROEDER and HAWKINS, Circuit Judges.

Deante Broussard appeals the district court's sentence of two years imprisonment, followed by three years of supervised release, arising from his violation of the conditions of his previous supervised release term. We affirm the

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

two year term of imprisonment, but remand for resentencing on the term of supervised release.

Broussard first contends that the district court erred by classifying a prior criminal contempt conviction under 18 U.S.C. § 401(3) as a Class A felony, rather than as a Class E felony. The government concedes that the contempt conviction should not have been classified as a Class A felony, but contends on appeal that it should be considered a Class D felony. United States v. Carpenter, 91 F.3d 1282 (9th Cir. 1996), instructs that “criminal contempt should be classified for sentencing purposes according to the applicable Guidelines range for the most nearly analogous offense.” Id. at 1285. Carpenter also gives deference to the “district judge’s discretion” in classifying the contempt conviction. Id. We therefore remand for the district judge to determine, in the first instance, whether Broussard’s prior contempt conviction should be considered a Class D felony, as the government contends, or a Class E felony, as Broussard contends, and to revise the term of supervised release accordingly. We reject the government’s argument that the district court may have been dealing with Broussard’s convictions separately, silently intending to sentence him to consecutive, rather than concurrent, terms. The sentencing transcript does not support the government’s position.

Broussard next argues that the district court abused its discretion in sentencing him to two years in prison, when the United States Sentencing Guidelines suggested a range of seven to thirteen months. The Guidelines range enjoys no presumption of reasonableness. United States v. Carty, 520 F.3d 984, 991 (9th Cir. 2008) (en banc). The district judge appropriately calculated the Guidelines range and cogently explained her reasons for departing upward. There was no abuse of discretion.

We therefore AFFIRM Broussard's two year term of imprisonment. We VACATE Broussard's supervised release term and REMAND for the district judge to determine the proper classification of Broussard's prior contempt conviction.

VACATED and REMANDED, in part; AFFIRMED in part.